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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 16 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for the classification sought, but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits two briefs and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's valid concerns with evidence of the petitioner's accomplishments as of the date of filing. Specifically, the petitioner's publication record consisting of a single minimally cited published article and two poster presentations, reference letters and other evidence of record fail to establish the petitioner's influence in the field as of the date of filing.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. degree in Neurology from Peking University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, medical research, and that the proposed benefits of her work, improved treatment for Amyotrophic Lateral Sclerosis (ALS) also known as Lou Gehrig's Disease, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The director concluded that the petitioner had not demonstrated a past history of achievement with some degree of influence on the field as a whole as she had not established that her work is well cited. On appeal, counsel asserts that *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215 does not require evidence of citations, but notes that the petitioner's published articles have been

minimally cited. Counsel asserts that the petitioner's qualifications and experience would be deemed unduly restrictive by the Department of Labor, rendering the labor certification process impractical. Counsel further asserts that the petitioner submitted letters from independent researchers applying her work. Counsel concludes that the petitioner's first-authored published paper, which has now been cited three times, justifies projections of future benefit to the national interest. Counsel notes that the alien in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215 had no such accomplishments. Counsel further relies on the submission of the petitioner's work to the *Proceedings of the National Academy of Sciences* and e-mail messages requesting advice as evidence of the significance of the petitioner's work. Counsel further notes that the petitioner is a member of the honor society Sigma Xi. Finally, counsel asserts that the petitioner qualifies for classification as an Outstanding Researcher pursuant to Section 203(b)(1)(B) of the Act, which does not require labor certification, and, thus, should also qualify for a waiver of the labor certification process in the national interest.

In the body of *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 219, it states that the petitioner must establish "that the alien's past record justifies projections of future benefit to the national interest." In an explanatory footnote of this concept that is noteworthy despite its placement as a footnote, the decision states that the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole." While the decision does not discuss publication records and citation histories, the case involved a civil engineer, not an occupation likely to produce a highly cited publication record. More relevant to a civil engineer, the decision states:

> While innovation of a new method is of greater importance than mere training in that method, it must be stressed that such innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis.

Id. at 221, n.7. We find that publication by medical researchers is comparable to patented innovations in civil engineering. We will not presume the influence of the findings in a given article solely from its publication. Rather, the significance of the original findings will be considered on a case by case basis as with patented innovations. While not the only possible basis of demonstrating the significance of published research, citations can serve as a useful means of evaluating the research community's reaction to a published article. Thus, we reject counsel's implication that the petitioner's citation record is not relevant.

Regarding concerns that the petitioner's experience is not conducive to the labor certification process, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5. Nothing in the legislative history suggests that the national interest waiver was intended simply as a

means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223. It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization, such as medical researchers. *Id.* at 217.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Dr. [redacted], Chairman of the [redacted] at the [redacted] Baylor College of Medicine, asserts that the petitioner has worked in his laboratory since December 2001. The petitioner has focused on ALS, investigating whether the motor neuron injury seen in that disease is "dictated solely by intracellular events (such as cell-autonomous), or whether the process is non-cell autonomous and other cellular events are required." This work involved culturing a motor neuron, a difficult procedure that only the petitioner is able to perform in Dr. [redacted] laboratory. The petitioner "demonstrated that the activated microglia contribute to motor neuron injury and death by the release of three free radicals, nitric oxide and superoxide, which combine to form the potent toxin, peroxynitrite." This work was published in the *Journal of Neuropathology and Experimental Neurology*.

The petitioner also investigated VP025, "a new phospholipids agent that is the lead product candidate from a new class of structurally related drugs that is designed to interact with the immune cells, leading to the modulation of cytokines, which are potent chemical messengers that regulate and control inflammation." In collaboration with an assistant professor, the petitioner demonstrated that VP025 "has the ability to protect the motor neuron from injury in vitro and significantly delay the onset of disease and increase the chance for survival in an animal model of ALS." The petitioner presented this research at a conference in 2004. The petitioner also investigated two other agents, the anti-inflammatory cytokines interleukin-4 (IL-4) and interleukin-10 (IL-10). These agents "struck the appropriate target to rescue the motor neuron from injury." The petitioner presented this work at a conference in 2005 and, as of the date of filing, had submitted a manuscript for publication. Both presentations appear to have been poster presentations rather than oral presentations. Dr. [redacted] explains that the petitioner's work has implications for Alzheimer's and Parkinson's Diseases as well.

Dr. [redacted] another collaborator at Baylor College, asserts that the petitioner provided the first results demonstrating a beneficial effect from IL-4 and IL-10. Dr. [redacted] further asserts that the petitioner compared spinal cord extracts from wild-type and mutant mice and demonstrated that the level of IL-4

"increased during the onset of the diseases and significantly decreased at the end stage" for the mutant mice. These results provide "some promising approaches for developing an effective treatment for ALS."

Dr. [redacted] Medical Director at the Muscular Dystrophy Association in [redacted] asserts that she became aware of the petitioner's work through Dr. [redacted] and has subsequently read the petitioner's article and interacted with her at a conference. Dr. [redacted] reiterates much of the information discussed above but provides no examples of independent laboratories being influenced by the petitioner's work.

On motion, the petitioner submitted four new letters, three of which are from researchers with no connection to the Baylor College of Medicine. Dr. [redacted], a professor of medicine at the University of Texas, asserts that he learned of the petitioner's work through her paper in the *Journal of Neuropathology and Experimental Neurology* while he was searching for other disease models to widen the usage of the compounds he was already studying, avicins, which are isolated from an Australian tree. Dr. [redacted] asserts that the petitioner's work "suggests that anti-inflammation and cytoprotection represent two important strategies for the treatment" of ALS. Dr. [redacted] then asserts that his own studies demonstrated that avicins have a neuroprotective effect, but that the effective range of doses is relatively narrow. Dr. [redacted] then concludes, with little explanation, that the petitioner's work "contributed to the development of effective approaches for treating neurodegenerative diseases through the use of genetic and molecular factors to slow and eventually prevent disease progression." Dr. [redacted], however, does not identify any clinical trials of treatments based on the petitioner's work or pharmaceutical companies that have committed to pursuing treatments based on her work.

Dr. [redacted] further asserts that the petitioner's development of a unique *in vitro* primary culture system is a significant contribution to the field. Dr. [redacted] notes that *in vitro* studies are more efficient than *in vivo* studies and that motor neurons are difficult to culture. Dr. [redacted] does not claim to have been particularly influenced by the petitioner's work and his letter cannot demonstrate the petitioner's influence outside of Houston, Texas, the location of both the Baylor College of Medicine and the University of Texas campus where Dr. [redacted] teaches.

Dr. [redacted], Co-chair of the Department of Clinical Neurological Sciences at the University of Western Ontario, asserts that he became aware of the petitioner when Dr. [redacted] recruited her to his laboratory. We note that this was prior to the petitioner's article in the *Journal of Neuropathology and Experimental Neurology*. Dr. [redacted] reiterates the information discussed above. Dr. [redacted] concludes that the petitioner's work is "novel, and will undoubtedly lead to significant new therapeutic approaches that will be focused on modifying the immunologically mediated component of this illness." Dr. [redacted] does not identify any current studies pursuing treatments based on the petitioner's work. Dr. [redacted], a professor at Columbia University, provides a similar letter.

Finally, Dr [redacted] a professor at the Baylor College of Medicine asserts that he "noticed" the petitioner's paper and will be referring to it in his own work. The petitioner has not demonstrated that it is notable for researchers at the same institution to influence one another.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner initially submitted an unpublished manuscript, her article published in the *Journal of Neuropathology and Experimental Neurology*, her Chinese language articles and evidence of her conference presentations, which appear to be poster presentations, not oral presentations. The petitioner also submitted what appear to be two Chinese language articles with no translation as required under the regulation at 8 C.F.R. § 103.2(b)(3). The petitioner also submitted evidence of her associate membership in the American Academy of Neurology.

In response to the director's request for additional evidence, the petitioner submitted evidence that her article in the *Journal of Neuropathology and Experimental Neurology* had been cited once. The petitioner also submitted the positive reviews of the article prepared by the anonymous referees for the journal. All articles published in peer-reviewed journals, however, must have been favorably reviewed by the peer reviewers.

On appeal, the petitioner submits evidence that after the date of filing, Dr. [redacted] submitted a manuscript authored by the petitioner to the *Journal of Neurochemistry* and an e-mail notice advising that the manuscript was acceptable for publication. The petitioner also submits a review recommending publication in the *Proceedings of the National Academy of Sciences* of a manuscript listing the petitioner as the fourth author. In addition, the petitioner submits e-mail requests for information addressed or forwarded to the petitioner. These e-mail requests postdate the filing of the petition. These documents all relate to the dissemination of the petitioner's work and interest in her work after the date of filing and cannot be considered evidence of her eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In addition, the petitioner submits evidence that her article in the *Journal of Neuropathology and Experimental Neurology* has been cited five times. The petitioner provided the articles that cite her work, two of which are in English. One of the English citations is as one of eight articles that demonstrate that microglia "can act as not only antigen-presenting cells but also effector cells to damage central nervous system cells directly *in vitro* and *in vivo*. The second English citation is in

support of the proposition that a "variety of studies have documented the ability of macrophages and microglias to secrete oxidizing species following stimulation with activating ligands."

The petitioner also submitted evidence that the petitioner was elected to membership in Sigma Xi on an unknown date in 2005. The petitioner filed the petition on July 8, 2005. The record does not establish whether the petitioner was elected to membership prior to the filing date. Regardless, a professional membership indicative of a degree of expertise significantly beyond that ordinarily encountered in the field could fulfill one of the criteria for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting one of the criteria, or even the requisite three criteria, warrants a waiver of that requirement in the national interest.

Finally, as stated above, counsel asserts on appeal that the petitioner qualifies for a separate classification that does not require a labor certification. Specifically, counsel asserts that the petitioner meets two of the criteria for Outstanding Researchers set forth in the regulation at 8 C.F.R. § 204.5(i)(3)(i).[1] The petitioner's claimed eligibility under a separate classification is not a relevant consideration. Moreover, the criteria for the Outstanding Researcher or Professor classification are different from the waiver considerations and even if the petitioner were eligible under that classification, and we do not imply that she is, such eligibility is not presumptive evidence of eligibility under the classification sought.

As of the date of filing, the petitioner had published a single article and displayed her work as a poster presentation at two conferences. Even as of the date of appeal, the petitioner's article has been minimally cited and the citations provided do not single out the petitioner's work as notable. The reference letters show that the petitioner is respected by her colleagues and has made useful contributions in her field of endeavor. It can be argued, however, that most research, in order to receive funding or be published, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher performing original research who has been published and is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. In the field of medical research, the lack of at least a moderate publication record makes it difficult to gauge the researcher's influence in the field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not

[1] We note that submitting evidence relating to at least two of the regulatory criteria is insufficient. Outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation relating to that classification provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. 56 Fed. Reg. 30703, 30705 (July 5, 1991).

established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.